NO. 42771-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 09-2-06759-2

TYLER & DAWN MITCHELL, husband and wife,

Defendants/Appellants,

v.

BUILDER OF DREAMS, LLC,

Defendant/Respondent.

APPELLANTS' OPENING BRIEF

Brian M. King, WSBA #29197
Rebecca M. Larson, WSBA # 20156
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500

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II. ASSIGNMENTS OF ERROR

1. The trial court erred in awarding judgment in favor of Builder of Dreams and against Defendants Mitchell, along with pre and post judgment interest, attorney's fees, and costs.

2. The trial court erred in making the following Findings of Facts entered on October 21, 2011, which were not supported by the evidence presented at trial or in post-trial motions:

   Finding of Fact 37: In addition to the Contract, the parties had separate oral agreements upon which they relied to define their contractual relationship;

   Finding of Fact 43: There was an understanding between the Mitchells and Builder that the amount that was going to be billed to Mitchell and the cost to build this custom home was going to exceed the amount that was going to be financed by the Lender;

   Finding of Fact 85: Substantial evidence demonstrated that the changes in the scope of the work were performed expressly at the request of the Mitchells with at least an implied agreement to pay for the extra work at a reasonable cost;

   Finding of Fact 86: The Mitchells could not have assumed that all of the changes they requested would be made without adjusting the price;

   Finding of Fact 110: The parties treated the Contract to be as one for the construction of a custom home on a cost-plus basis;

   Finding of Fact 111: Builder did not treat the Contract like a fixed-price contract;

   Finding of Fact 118: The Mitchells' acquiescence to the manner of billing and that construction of the custom home was being billed on a cost-plus basis is inconsistent with the

Mitchells' position that the Contract was for the construction of a custom home for a fixed price;

Finding of Fact 119: The Mitchells' acquiescence to the manner of billing and that construction of the custom home was being billed on a cost-plus basis is consistent with Builder's position that the contract was for the construction of a custom home on a cost-plus basis;

Finding of Fact 137 (and 173): The contract between the parties was for construction of a custom home on a cost-plus basis, and not on a fixed-price basis.

Finding of Fact 181: Builder has claimed it is entitled to an award of attorney fees and costs as the prevailing party, pursuant to Paragraph 28 of the Contract;

Finding of Fact 182: Paragraph 28 of the Contract provides that "[f]or any dispute, Owners are solely responsible for any consequential expenses, damages, and attorney fees incurred in resolving the dispute";

Finding of Fact 183: The facts and circumstances of this action constitute a "dispute," as that term is used in Paragraph 28 of the Contract;

3. The trial court erred in making the following Conclusions of Law entered on October 21, 2011, which were not supported by the Findings of Fact:

Conclusion of Law 3: The contract between the Mitchells and builder was for construction of a custom home on a cost-plus basis, and not on a fixed-price basis.

Conclusion of Law 8: Paragraph 23 is a boilerplate clause.

Conclusion of Law 9: Paragraph 23 of the Contract was not factually correct at the time that it was entered into; indeed, it was factually false.

Conclusion of Law 10: There was a merger of the oral and written terms of the Contract.

Conclusion of Law 26: The Mitchells and Builder, by their conduct subsequent to execution of the Contract, each waived any requirement contained in the Contract that change orders be memorialized in writing.

Conclusion of Law 27: Builder is entitled to judgment in the amount that Builder billed to the Mitchells as of November 3, 2008, plus prejudgment interest, plus attorney's fees and costs.

Conclusion of Law 28: Builder is entitled to an award of $126,598.57 as the Principal Amount of its judgment, which is equal to the amount that Builder billed to the Mitchells as of November 3, 2008.

Conclusion of Law 29: Builder is entitled to an award of Pre-Judgment Interest accruing on the Principal Amount since November 3, 2008 at a rate of 1% per month compounded monthly.

Conclusion of Law 30: Builder is entitled to an award of Attorney's Fees and Costs pursuant to paragraph 28 of the Contract.

Conclusion of Law 31: Builder is entitled to Post-Judgment Interest at a rate of 12% per annum on the Total Judgment Amount, which is calculated as the sum of the Principal Amount, Prejudgment Interest as of the date of entry of judgment, and Attorneys Fees and Costs.

Issues Pertaining to Each Assignment of Error:

Whether there was substantial evidence to support each of the Findings of Fact, and whether the Findings support the trial Court's Conclusions of Law.

The Mitchells contend that the evidence did not support the findings that the subject Contract was a cost-plus as opposed to a fixed-price contract. (Findings of Fact 37, 43, 85, 86, 110, 111, 118, 119, 137 and Conclusions of Law 3, 8, 9, 10, 26, 27, 27, 29).

The Mitchells also contend that the terms of the dispute resolution provision of the Contract were ambiguous and did not support an award of attorney's fees in favor of Builder of Dreams. (Findings of Fact 181, 182, 183 and Conclusions of Law 30, 31).

III. STATEMENT OF THE CASE

This appeal arises from a dispute between Tyler and Dawn Mitchell ("the Mitchells") and Builder of Dreams, LLC, ("Builder of Dreams") over the construction of a single-family home on Lake Tapps, WA. Tyler and Dawn Mitchell are a married couple residing in Lake Tapps/Sumner, Washington. (RP 196:8 – 197:3). Builder of Dreams is a single-member limited liability company formerly engaged in construction practices. Its owner is Dan Moore. (RP 18:18-24).

The Mitchells own real property located at 2208 186th Avenue East, Lake Tapps, Washington. (RP 196:18-22). In 2007, Mr. and Mrs. Mitchell decided to build a home on a lot they owned there. To do so, they had plans drafted by Cascade Design. (RP 198:1-2). The Mitchells obtained bids from three different contractors but did not accept any of those bids. (RP 199:4 to 200:4). Ultimately, the Mitchells accepted a bid from Respondent Builder of Dreams, which was lower than the first three bids. (RP 202:18-24).

On or around March 9, 2007, Mr. and Mrs. Mitchell entered into a written Custom Home Construction Contract ("Contract") with Builder of Dreams for the construction of the home. (CP 49-57). Builder of Dreams presented the Contract to defendants Mitchell on a form contract prepared by Builder of Dreams. The Contract specified a total contract price for

construction of the home in the amount of $1,032,523.00. (Id). A Cost Breakdown for the job was signed on May 21, 2007, which separated the proposed Contract price in to individual construction categories, all of which added up to $1,032,523.00. (RP 208:12 – 210:4). Neither the Contract nor the Cost Breakdown contained a separate estimate or itemization concerning sales tax. The Contract was a "fixed-bid/fixed price" contract and not a "time and materials" contract. Accordingly, Builder of Dreams accepted the risk of increases in material and labor costs after mutual execution of the Contract.

As the project progressed, Builder of Dreams' billing practices treated this project essentially as a "time and materials" project, directly contrary to the terms of the Contract. Early on in the project, Mr. and Mrs. Mitchell asked Mr. Moore why certain invoices appeared higher than the amounts set forth in the Cost Breakdown. (RP 220:22 to 221:3). Mr. Moore assured them that other invoices would be lower than set forth in the Cost Breakdown, and "it would all work out in the end," meaning that the total amount of the invoices would match the Contract price. (RP Id., and 309:4 to 310:10).

The Contract contains specific provisions concerning potential modifications of the construction specifications and/or the Contract price. At no time did Mr. and Mrs. Mitchell agree to any change orders or

modification of the total Contract price. In fact, no written change orders were ever presented to Mr. and Mrs. Mitchell. (RP 291:18 to 292:1).

Near the end of the project, it became increasingly clear to the Mitchells that, notwithstanding the lack of any change orders and Mr. Moore's assurances that it would "work out in the end," the invoices from Builder of Dreams would be significantly greater than the agreed contract price. (RP 250:2-18). In order to try and mitigate damages and avoid foreclosure, Mr. and Mrs. Mitchell decided to contract directly with certain subcontractors in order to try and minimize the total amount of the construction costs. (RP 223:1-18). Builder of Dreams did not object to this approach. The Mitchells paid for several aspects of the project directly to subcontractors, and therefore several line-items from the Cost Breakdown were paid to subcontractors and not to Builder of Dreams, including landscaping, tiles, flooring, cabinets, appliances, and entertainment wiring. (RP 228:18-229:23; 232-235). Although the Mitchells' efforts allowed them complete the project and mitigate the over-charges, the Mitchells overpaid for the project by several hundred thousand dollars. (RP 225:17-25).

Pre-Trial Procedural History:

This lawsuit has an unusual procedural history. On or around March 10, 2009, Plaintiff JJ Plumbing, LLC filed a Complaint in which it

asserted breach of contract claims against Builder of Dreams, LLC and a bond claim against Builder of Dreams' contractor's bond. JJ Plumbing also asserted a lien foreclosure action against Tyler and Dawn Mitchell.

Mr. and Mrs. Mitchell timely answered the JJ Plumbing's Complaint. Builder of Dreams ignored the lawsuit. On May 8, 2009, JJ Plumbing entered a default judgment against Builder of Dreams.

On May 29, 2009, three weeks after it had been defaulted as a party to the action, Builder of Dreams filed a "Cross Claim for Money Damages and Foreclosure on Lien." The cross claim was filed without vacating the default judgment against it. Builder of Dreams' cross claim asserted several claims against defendants Mitchell, including breach of contract and a lien foreclosure action. Several motions were subsequently filed concerning Builder of Dreams' Cross Claim. Defendants Mitchell contended that the lien foreclosure claim was improper because it was not timely filed and because Builder of Dreams did not serve all necessary parties.

On October 23, 2009, the parties filed a "Stipulation and Agreed Orders re: Foreclosure Causes of Action and Continuation of Trial Date." As a result of the Stipulation, JJ Plumbing and Builder of Dreams both agreed to dismiss their lien foreclosure claims against the Mitchells with

prejudice. On October 4, 2009, JJ Plumbing filed a Satisfaction of Judgment for its judgment against Builder of Dreams.

As a result of this procedural history, the remaining parties at trial were Plaintiff Builder of Dreams which asserted a breach of contract claim against Mr. and Mrs. Mitchell; and Defendants Mitchell, who asserted claims for breach of contract (including claims for reimbursement of overpayments and improper billing practices) and violation of the Consumer Protection Act ("CPA") against Builder of Dreams.[1]

Trial and Judgment:

This case was tried to the court on July 18 and 19, 2011. The trial judge issued an oral ruling on August 8, 2011. (CP 368-412). Findings of Fact and Conclusions of Law were entered on October 21, 2011. (CP 455-477). The judge concluded that the contract between the Mitchells and Builder of Dreams was for construction of a custom home on a cost-plus basis and not on a fixed-price basis (COL 3) and awarded a principal judgment of $126,598.57 to Builder of Dreams against the Mitchells, along with pre-judgment interest of $53,769.63 and attorneys fees of $44,812.50, plus statutory costs of $330.00. (CP 453-454, 478-479). The total amounts awarded to Builder of Dreams was $225,509.70. The trial

[1] Developers Surety and Indemnity Co., was a nominal party at trial due to its issuance of Bond No. 549804C, but they are not involved in this appeal.

judge also found that the Mitchells' claims for CPA violations failed and should be dismissed. (RP 455-477). The Mitchells now appeal.

IV. ARGUMENT

a. Contract Issues:

1. Standard of Review:

When reviewing a trial court's findings of fact and conclusions of law, findings of fact are reviewed to determine if they are supported by substantial evidence in the record. If such a showing is made, the court must decide whether those findings support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

2. The Trial Court Erred in Finding that the Parties Entered into a "Cost Plus" Contract.

This matter turns on whether the parties entered into a fixed price contract or a cost plus (time-and-materials) contract for the construction of a home. The trial court found that the parties intended a cost plus contract, and therefore Builder of Dreams was entitled to additional compensation beyond the fixed amount stated in the Contract. This finding and the judgment based upon it are not supported by the evidence at trial and should be reversed.

As noted, on or around March 9, 2007, Mr. and Mrs. Mitchell entered into a written Custom Home Construction Contract ("Contract") with Builder of Dreams for the construction of the home. Builder of Dreams presented the Contract to defendants Mitchell on a form Contract prepared by Builder of Dreams. The Contract specified a total contract price for construction of the home in the total amount of $1,032,523.00. On May 21, 2007, Builder of Dreams presented a "Cost Breakdown."[2] The Cost Breakdown broke down the proposed Contract price in to individual construction categories which still added up to $1,032,523.00. Neither the Contract nor the Cost Breakdown contained a separate estimate or itemization concerning sales tax.

It is the Mitchells' position that the Contract specifically represented a fixed-bid/fixed price Contract; it was not a cost plus/time-and-materials contract. Accordingly, Builder of Dreams accepted the risk of increases in material and labor costs after mutual execution of the Contract.

Builder of Dreams claims that it made changes to the original home plans at the request of Mr. and Mrs. Mitchell which required additional work and materials and therefore incurred additional fees and

[2] It appears that the parties re-signed the Contract with some additional language written in on May 21, 2007, the same date that the Cost Breakdown was signed. RP (7/19/11) 208: 8 to 209:10.

costs for which it should be compensated. It also claims that the Mitchells understood that they would be charged additional fees for the extra work and agreed to these additional charges. Builder of Dreams further argued that the "fixed" amount specified in the Contract was primarily for purposes of complying with the requirements of the Mitchells' Lender.

The trial court agreed with Builder of Dreams, making the following findings:

> There was an understanding between the Mitchells and Builder of Dreams that the amount to be billed to the Mitchells and the cost to build the home would exceed the amount financed by the Lender (FOF 43);
>
> Substantial evidence demonstrated that the changes in the scope of the work were performed expressly at the request of the Mitchells with at least an implied agreement to pay for the extra work at a reasonable cost (FOF 85);
>
> The Mitchells could not have assumed that all of the changes they requested would be made without adjusting the price (FOF 86);
>
> The parties treated the Contract to be as one for the construction of a custom home on a cost-plus basis (FOF 110);
>
> Builder did not treat the Contract like a fixed-price contract (FOF 111):
>
> The Mitchells' acquiescence to the manner of billing and that construction of the custom home was being billed on a cost-plus basis is inconsistent with the Mitchells' position that the Contract was for the construction of a custom home for a fixed price (FOF 118);

> The Mitchells' acquiescence to the manner of billing and that construction of the custom home was being billed on a cost-plus basis is consistent with Builder's position that the contract was for the construction of a custom home on a cost-plus basis (FOF 119);

These findings are not consistent with the testimony given at trial. The Mitchells both disputed that they agreed to or expected to be charged additional fees for extra work. The findings also ignore the assurances given to the Mitchells by Dan Moore, Builder of Dreams' owner, that the total amounts paid for various invoices would even out and eventually comply with the fixed Contract price.

Tyler Mitchell gave the following testimony regarding what he expected the house to cost:

> Q. What was your understanding regarding the total contract price that was identified in paragraph 9 of the contract?
> A. That that's what I would pay Dan Moor, Builder of Dreams.
> Q. To build your house?
> A. Correct.
> Q. Did Mr. Moore ever indicate that this was a time-and-materials project or a cost-plus project and not a contract to build the home at that price?
> A. Did he indicate . . . ?
> Q. Did he ever indicate that the amount, that this was a time-and–materials project and not a contract to build the house for $1,032,023?
> A. No. I was under the impression that I would spend a million 32.

(RP 209:11 to 210:1).

Unexpected but necessary changes to the designs did not change the fixed-price understanding. For example, Mr. Mitchell gave the following testimony regarding changes that were made to the plans for a staircase:

> Q. Early on in the project, did Mr. Moore ever indicate that there were issues with the construction or the plans that were causing overruns on the contract amount?
> A. No.
> Q. Early on in the project, did Mr. Moore identify what he characterized as problems with the construction?
> A. Once we got into framing the house, the – they laid out the staircase that was drawn and figured out that it would not work with the entryway, so that was changed. And then the permit process, we had an issue with the breezeway, and that was changed.
> Q. With respect to the staircase, what did the original plans show as far as the staircase?
> A. When you walked in the door, there was maybe five stairs that went up to a landing and then from that landing the staircase would split to the left and one to the right.
> Q. Was it your understanding that the staircase wouldn't work with respect to the plans as designed?
> A. That's – yes.
> Q. In other words, did you or Dawn ask for a change in the plans that resulted in the staircase not working?
> A. No, but the – Cascade Residential drew the plans, and once it was laid out during framing, we saw that the staircase would virtually be almost at the front door so it had to be changed.
> Q. Okay. Did you have a discussion with Mr. Moore about that change?
> A. We did.
> Q. And what did Mr. Moore say about that proposed change?

A. That we needed to change it because you're virtually going to walk in the front door and be on some stairs, so we changed it to a single staircase that came down the back wall of the entry.
Q. Did Mr. Moore suggest the change to the stairway?
A. Yes. It wouldn't work.
Q. Did Mr. Moore indicate that that would result in a higher cost to the construction?
A. No.
Q. Did he mention anything with respect to the cost of construction as it related to the stairway?
A. No.

(RP 231:7 to 214:24).

Mr. Mitchell gave the following testimony regarding changes that were made to the plans for a breezeway on the home:

Q. With respect to the breezeway, was that a request that you made, or is that one that Mr. Moore indicated to you needed to be made?
A. He indicated it needed to be made to have the living area above the garage.
Q. Based on the codes, the applicable codes?
A. Yes. It was based on what Pierce County told us for the permit.
Q. Did Pierce County tell you that or did Mr. Moore tell you that Pierce County told you that?
A. Mr. Moore.
Q. Did you rely on Mr. Moore's representations for the need of a breezeway?
A. We did.
Q. Did Mr. Moore indicate that the change to and the plans for a breezeway would result in a higher cost to the construction?
A. No, he did not.

(RP 216:6-23).

Mr. Mitchell clearly believed the project was proceeding on a fixed price basis. Despite any changes that might be needed to the plans, Mr. Moore never indicated that the ultimate cost of the home, as indicted in the Contract or in the Cost Breakdown, would change. There was no evidence that the Mitchells were aware that the costs would increase or that Builder of Dreams would increase its charges. In fact, they were told there would be no additional costs (see below).

As the project progressed and the costs began to clearly exceed those listed on the Cost Breakdown, and the Mitchells became concerned. However, Mr. Moore assured them that the fixed price number remained their cost:

> Q. Did you express your concerns about the cost of the project to Mr. Moore?
> A. I did.
> Q. What was his response?
> A. He said as things go on, it would get cheaper and it would all work out in the end.
> Q. Did that satisfy your concerns?
> A. No. I did try to talk to other builders about taking the project over, but nobody would jump into a project that somebody had started because they would not warranty it because they did not use their subs, so I was stuck.
> Q. So you proceeded with Mr. Moore?
> A. I did.
> Q. That was based on his representations that it would – that the construction – did he represent that the total construction amount would equal the contract amount?

A. Yes.

(RP 220:22 to 221:15).

Mr. Moore made assurances that the Cost Breakdown would even out and not exceed the Contract amount. This indicates that the parties were proceeding as if the Contract was for a fixed price. The trial court's findings to the contrary are in error.

Mrs. Mitchell's testimony regarding cost representations from Mr. Moore was consistent with that of her husband. As to the staircase issue, she stated the following:

> Q. Did Mr. Moore indicate that that [changing the staircase design] would increase the cost of the contract?
> A. No. He actually said it would be less.
> Q. What did he say about that?
> A. Just that it would be less detail, less, you know, work. Wouldn't be as many stairs. Wouldn't be as much iron railing. So . . .

(RP 303:15-21).

As with her husband, Mrs. Mitchell testified about concerns for cost overruns:

> Q. Did you have any concerns relatively early on about the invoices and other financial information that was being provided by Builder of Dreams?
> A. Yes.
> Q. What were your concerns?
> A. It just – everything was going over what the price list was.
> Q. Did you – what did you want to do about that?

A. I wanted to find another builder.
Q. Did you make efforts to find another builder?
A. I did.
Q. Did you do so on your own?
A. Yes.
Q. Why didn't you hire another builder?
A. Everyone that I talked to said that they wouldn't come in on a job that another builder had started. They had reluctance to come in because they didn't know the people that had done the work prior to them and there couldn't be a warranty.
Q. . . . . Did you have any discussions directly with Mr. Moore regarding your concerns about the invoices?
A. Yes. Twice.
Q. What did you indicate to Mr. Moore were your concerns?
A. I just – I went in a meeting with Tyler and myself and Dan and I was emotional and it just – my concerns were everything was going over budget, and I was just told that it will all work out in the end. The number –
Q. Who told –
A. Dan told me that the numbers would be high up here and lower on something else so it will all work out in the end.

(RP 309:4 to 310:10).

Again, Mr. Moore indicated that the final price of the house would be consistent with the Contract price. It is not reasonable to assume that the Mitchells were proceeding as if there were a cost-plus contract under these circumstances. The trial court's finding that changes in the scope of work were performed expressly at the request of the Mitchells and that they at least impliedly agreed to pay for the extra work at a reasonable cost (FOF 85) is not supported by substantial evidence. The Mitchells never

agreed to proceed on a cost-plus basis. Instead, they were assured that the price would remain as originally fixed.

3. Builder of Dreams is not Entitled to Additional Compensation Beyond the Fixed Price of the Contract Because It Failed to Comply with the Terms of the Contract.

The fixed-price Contract provided that any Change Orders, including changes in the Contract's price, had to be made in writing. The Contract stated the following:

> Section 17 – Custom Changes
>
> With Contractor's consent, which may be withheld for any reason, Owners may request custom design changes and/or materials upgrades. **Owner shall submit to Contractor a written change order describing the proposed change(s) and/or upgrade(s).** Any change order may increase the Contract Price and/or delay the Completion Date. Such changes, upgrades, and all applicable taxes must be paid for separately in advance, and will not be rolled into regular draws. Due to the nature of custom work, all custom costs will be non-refundable as Contractor cannot return items or undo custom work.
>
> **The parties must agree in writing to any plan or specification changes in order to me made a part of this agreement.** Costs for any kind of changes may include, in addition to time and materials and markup, the costs of extra design work, estimating, supervision, labor, rescheduling, restocking, and delays in progress.
>
> If the parties cannot agree upon Owners' desired changes and/or upgrades, Contractor may elect to terminate this agreement and recover that portion of

> the Contract Price equal to that percentage of the work done up to that time, plus all applicable taxes, or continue to work with delay in Completion Date equal to days spent in discussion of changes.

(CP 53 - emphasis added).

> 23. No Verbal Representations. Owners acknowledge and understand that their written contract is the complete and entire understanding of the parties, and **no verbal promise or representation by anyone shall vary or modify the written contract. All discussions shall have no effect unless signed in writing by the parties.**

(CP 55 - emphasis added).

Under Washington law, Builder of Dreams' failure to abide by the terms of the Contract, which it drafted, along with its failure to obtain Mr. and Mrs. Mitchell's written consent for the additional charges, precludes it from collecting the additional amounts. In *Mike M. Johnson v. Spokane County*, 150 Wn.2d 375, 78 P.3d 161 (2003), the Supreme Court of Washington reaffirmed the long-standing rule that a contractor is not entitled to additional compensation under a contract without complying with its own contractual notice and claim procedures. In *Mike M. Johnson*, the contractor had informed the county that it was experiencing delays and costs due to changed or unforeseen conditions. However, the contractor never complied with the construction contract's procedural requirements for obtaining additional compensation under the contract.

As such, even though the county had actual notice of the contractor's claims, the *Mike M. Johnson* court refused to reverse the trial court's order granting the county summary judgment, given that the contractor had failed to comply with the procedural requirements of the contract, and there was no evidence of waiver by the county of the requirements. *Id.* at 387-392.

Likewise, in this case, Builder of Dreams never complied with the Contract's requirements that any changes or increases in the price of the Contract be in writing. In fact, it never once, verbally or in writing, requested that Mr. and Mrs. Mitchell agree to any change in the Contract's price, and Mr. and Mrs. Mitchell never waived this requirement of the Contract.

Waiver is the intentional and voluntary relinquishment of a known right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Waiver can be express or implied. *Puget Sound Dredging Co. v. Lake Washington Shipyards*, 1 Wn.2d 401, 410, 96 P.2d 257 (1939). An implied waiver must be shown by unequivocal conduct that evinces intent to waive. *Birkland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). This requires proof of conduct that is inconsistent with any intent other than waiver. *Id.* at 565.

None of the changes to the original building plans was ever reduced to writing in this case. However, in its oral ruling, the trial court stated that the Mitchells had waived this requirement by requesting certain changes:

> The next paragraph was Paragraph 17 regarding other changes, which I'll get back to in a moment, but basically what's relevant there is that if the owner – in other words, the Mitchells – wished to make a change to the contract, to the building plans and specifications, that they would submit it to Builder of Dreams in writing. I think the testimony was, again, undisputed, that there were never any written requests for change orders submitted by the Mitchells, yet Mrs. Mitchell testified that, for example, with regard to the master suite that the master suite as built looks nothing like the plans and specifications. Walls were moved or not even built. The fireplace was moved. The location of the sink and the toilet were moved. These were all done at the Mitchells' request, they did not submit it in writing, and the law is very clear that the parties can agree to modify a contract and waive provisions that are for their benefit. So here, by their subsequent conduct, it seems to me, the parties clearly waived any requirement that change orders be in writing.

(CP 380-381).

Even if the Mitchells had, in fact, requested all of the changes made, Builder of Dreams never indicated there would be additional costs for these changes, let along what those costs would be, as required in Section 17 of the Contract. There was no evidence presented that Builder of Dreams ever told the Mitchells that any changes would require additional payments. In fact, Dan Moore repeatedly told the Mitchells that

the costs would all "even out" in the end. The Mitchells did not waive any right to have additional bills or costs agreed to in writing. The fact that Mrs. Mitchell may have agreed to the changes or been pleased with the outcome does not suggest that she was aware that they would increase the costs. This is especially true when she questioned Mr. Moore on that very issue and was told some costs might even be less than anticipated.

As the project progressed, Builder of Dreams began over-billing and/or billing on a time and materials basis. Once it became clear to the Mitchells that these practices would result in substantial overpayments, Mr. and Mrs. Mitchell began making payments directly to subcontractors for the remaining Cost Breakdown items. As a result, Builder of Dreams did not incur the expenses for several of the items listed on the Cost Breakdown. Not only is there no evidence of waiver, there is actually substantial evidence that Mr. and Mrs. Mitchell took efforts to mitigate increased costs to the best of their ability.

One clear purpose of requiring a change order is to protect one party from the other party unilaterally changing the terms of a contract. Builder of Dreams was the party in this case that prepared the Contract and was aware of its terms. It could have complied with the terms of the Contract, but it chose not to do so. Mr. and Mrs. Mitchell should not have to pay an increased Contract price that they never agreed to and would not

have agreed to had Builder of Dreams properly complied with the terms of the Contract. Accordingly, they should have been refunded the amounts they were forced to pay over and above the Contract price in order to complete the project.

The trial court further found that Paragraph 23 of the Contract, the Integration Clause, was boilerplate language and was factually false at the time the parties entered into the Contract, thus making it unenforceable. (COL 7, 8, and 9). Paragraph 23 states that Owners acknowledge and understand that their written contract is the complete and entire understanding of the parties, and no verbal promise or representation by anyone shall vary or modify the written contract.

> In this case, both parties acknowledge that at the time they entered into this contract, there were plans and specifications regarding the construction of this home that were brought to the relationship by Mr. and Mrs. Mitchell. Nobody submitted to the Court the full plans and specification, and they apparently were not actually physically attached to the contract.
>
> Also, the parties had separate oral agreements and they had a separate written document called construction cost breakdown which was entered as Exhibit 2. So, clearly, on its face, this boilerplate paragraph was not factually correct at the time that it was entered into. In fact, it was factually false. There were other documents that formed part of these parties' agreement. So to try and say that this contract constitutes the entire agreement, I think, would effectively amount to constructive fraud.

(CP 375-376).

The trial court relied upon the case of *Lyall v. DeYoung*, 42 Wn. App. 252; 711 P.2d 356 (1985), which is distinguishable. There, the purchasers signed a purchase and sale agreement for real property. A separate earnest money agreement contained a paragraph warranting a well on the property. The purchase and sale agreement contained an integration clause similar to the one in the present matter. In *Lyall*, the seller argued that the warranty was not part of the purchase and sale agreement in light of the integration clause and could not be considered or enforced. The court, however, found that parol evidence could be admitted to show that the parties expressly relied upon the warranty language of the earnest money agreement in entering into the purchase and sale agreement, and therefore the integration language failed. *Id* at 257-58.

In *Lyall*, the language of the earnest money agreement conflicted with the purchase and sale agreement. Here, however, there was nothing in the Cost Breakdown sheet that conflicted with the Contract; in fact, both documents contained the same fixed-price number - $1,032,523.00. While the parties may have been aware of the Cost Breakdown sheet or other documents, they did not form part of the agreement. Therefore, the integration clause was not factually false and should not have been disregarded by the trial court.

In short, the plain language of the Contract shows that the parties in this matter agreed to build a custom home for Mr. and Mrs. Mitchell for a specific price. Mr. Moore assured them that the project would come in at that price. He should not have been rewarded for unilaterally changing the clear terms of that contract. The trial court's ruling against Mr. and Mrs. Moore should be reversed, and its judgment against Mr. and Mrs. Moore should be vacated.

b. Award of Attorneys Fees and Costs:

1. Standard of Review:

The standard of review for the reasonableness of the amount of an award of attorney fees is abuse of discretion. The trial court must provide an adequate record upon which to review a fee award. *Estrada v. McNulty*, 98 Wn. App. 717, 723, 988 P.2d 492 (1999). Findings of fact and conclusions of law in support of an attorney fee award are required. *Mahler v. Szucs*, 135 Wn.2d 398; 435, 957 P.2d 632 (1998); *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 9, 970 P.2d 343 (1999).

2. Builder of Dreams Does Not Have a Contractual Right to Attorneys Fees

The "Dispute Resolution" provision in the Contract upon which the trial court relied does not allow an award for attorney fees in the

current situation. Therefore, the trial court's award of attorney's fees is clearly in error.

A. Contractual Attorneys Fees Are Allowed Only Pursuant to a Specific Contractual Provision

"Attorney fees may be awarded only if authorized by contract, statute or recognized ground in equity." *Bowles v. Wash. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70 (1993). Attorney fees awarded pursuant to a contract are subject to the rules pertaining to construction and interpretation of contracts:

> "Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party."

Restat 2d of Contracts, § 206 as adopted through *Berg v. Hudesman*, 115 Wn.2d 657, 677 (1990).

Contract language subject to interpretation is construed most strongly against the party who drafted it. *Guy Stickney v. Underwood*, 67 Wn.2d 824, 827, 410 P.2d 7 (1966).

The Contract at issue in this case contained the following provision:

> 28. Dispute Resolution. To the extent that Purchasers may have any claim against Contractor for faults, construction defects, or breach of contract, Owners agree that, regardless of any warranty periods, they shall assert in writing any and all claims against Contractor within six (6) months of warranty expiration, or forever waive and release said claims in full as against Contractor. Any warranty work, regardless of when made, shall not extend this provision. For any dispute, Owners are solely responsible for any consequential expenses, damages, and attorney fees incurred in resolving this dispute.

(CP 55).

The Contract defines Builder of Dreams, LLC as "Contractor" and Mr. and Mrs. Tyler Mitchell as "Owners." Although the term "Purchasers" is used in the Dispute Resolution provision, "Purchasers" is not a defined term in the Contract. It is not clear why Paragraph 28 of the Contract refers to "Purchasers." (Capitalization in original). In any event, Mr. and Mrs. Mitchell are not defined as "Purchasers," and "Purchasers" is not an accurate description of the Mitchells' relationship with Builder of Dreams.

A "prevailing party" attorney fees provision in a contract ordinarily is not a complicated contractual provision. Had Builder of Dreams intended to include a prevailing party attorney fees provision in its form Contract regarding particular disputes, it easily could have done so. But it did not. In this instance, the single sentence Builder of Dreams relied upon at the trial court is buried at the end of the paragraph. The

primary purpose of the "Dispute Resolution" provision appears to be an effort by Builder of Dreams to substantially shorten the statute of limitations for bringing a warranty claim against the contractor. There are no other references to attorney fees anywhere in the Contract.

Paragraph 28 is to be read in the conjunctive. The final sentence of Paragraph 28, upon which Builder of Dreams relies to argue that the Mitchells owe it attorneys fees, is not a separate provision but is qualified by the definitions, terms and scope set forth within the preceding sentences of the paragraph. It is not a prevailing party attorney fees provision for claims brought by Builder of Dreams against "Owners." At best, the "Dispute Resolution" clause is ambiguous and open to at least four different reasonable interpretations (discussed in subsection D below). As the drafter of the Contract, the ambiguities must be construed against Builder of Dreams, and the Mitchells are not liable for any attorney's fees.

B. The Term "Purchasers" is Ambiguous and Undefined.

The first sentence of Paragraph 28 begins with a qualifying statement: "To the extent that Purchasers may have any claim against Contractor for faults, construction defects, or breach of contract...". This statement controls what comes later and indicates that the Dispute

Resolution provision is intended to deal with claims by a Purchaser against the Contractor. There is nothing to indicate that any claims by the Contractor against the Owner are contemplated by this paragraph.

The Contract does not define the term "Purchasers," and it is impossible to tell what Builder of Dreams intended when it drafted this language. When confronted with ambiguous terms, Washington courts have reasoned as follows:

> It is the general rule that the determination of whether a written instrument is ambiguous is a question of law for the court. We have further held that, in construing contracts, words are to be given their ordinary and usual meaning. Webster's New International Dictionary (2d ed.) defines ambiguous as '[c]apable of being understood in either of two or more possible senses.' We have approved the definition of ambiguity as an uncertainty of meaning in the terms of a written instrument.

Ladum v. Util. Cartage, 68 Wn.2d 109, 115-116, 411 P.2d 868 (1966).

Although the term "Purchasers" is not defined, it is used in a couple of other provisions in the Contract. It appears that the term "Purchasers" may refer to some unidentified third party. For instance, in Paragraph 22 of the Contract, the term "purchasers" (not capitalized) is used as follows: "[t]he warranty stated herein is not transferable from Owners to successive purchasers." In this context, the term "purchasers" clearly refers to third-parties other than the Mitchells. Paragraph 22 demonstrates that "Owners" are a separate and distinct party from

"purchasers." There is no reason to conclude that "Purchasers" in Paragraph 28 does not similarly apply to third-parties.

C. The Dispute Resolution Section Applies Only to Claims Brought By A Purchaser

In light of the definition of "purchasers" as used elsewhere in the contract, it appears Paragraph 28 only applies to claims asserted by third-parties. The first sentence of the Dispute Resolution provision defines the scope of the entire provision. The sentence states:

> "To the extent that Purchasers may have any claim against Contractor for faults, construction defects, or breach of contract, Owners agree that, regardless of any warranty periods, they shall assert in writing any and all claims against Contractor within six (6) months of warranty expiration, or forever waive and release said claims in full as against Contractor."

The provision is limited to situations where, "[p]urchasers may have any claim against Contractor for faults, construction defects, or breach of contract." Thus, at most, Owners (Mr. and Mrs. Mitchell) may be responsible for expenses, damages, and attorney fees only when Purchasers (an unknown third party) bring a claim against Contractor (Builder of Dreams) for faults, construction defects, or breach of contract. In the present matter, though, no "Purchasers" have brought any claims against Builder of Dreams.

As noted above, Paragraph 28 only references or concerns claims brought *against* the Contractor (Builder of Dreams). Nowhere in the Contract does it state or imply that Owners are responsible for paying Builder of Dreams' attorney fees or costs. It is silent concerning claims brought *by* Builder of Dreams. There is no attorney fees provision allowing Builder of Dreams to recover attorney fees on its own claim.

D. The Dispute Resolution Provision Does Not Identify Which Party's Attorneys Fees are the Responsibility of the "Owner" or Under What Circumstances Owner Must Pay.

The final sentence of the Dispute Resolution provision is equally ambiguous: "For any dispute, Owners are solely responsible for any consequential expenses, damages, and attorney fees incurred in resolving this dispute." The trial court found that the facts and circumstances of this action constituted a "dispute." (CP 472, FOF 183). This provision comes immediately after the statements discussing Purchasers' claims against the Contractor and a discussion of warranty issues. However, the trial court apparently believed that, despite the limiting language, the term "any dispute" truly meant *absolutely any* dispute. Under this reading, Mr. and Mrs. Mitchell would be responsible for all of the attorney's fees incurred by any party in resolving disputes of any kind between any entities. This

is not a reasonable reading of the sentence when considered in the context of the entire paragraph.

In light of the inconsistency in terms and extremely confusing and contradictory language in Paragraph 28, the final sentence of Paragraph 28 reasonably may be interpreted in at least four ways:

1. Owners are responsible only for their own incurred expenses, damages, and attorney fees related to a dispute as defined in Paragraph 28, *even if Owners prevail.*
2. Owners are responsible for their own incurred expenses, damages, and attorney fees, as well as Contractor's incurred expenses, damages, and attorney fees, related to a dispute defined in Paragraph 28, *regardless of which party prevails.*
3. Owners are responsible for their own incurred expenses, damages, and attorney fees, as well as all other third parties' incurred expenses, damages, and attorney fees, related to a dispute defined in Paragraph 28, *regardless of which party prevails.*
4. Owners are responsible for all parties' expenses, damages, and attorney fees incurred in any dispute of whatever nature, *regardless of which party prevails.*

It is altogether unclear for whose "expenses, damages, and attorney fees" Owners (Mr. and Mrs. Mitchell) may be liable. If the Mitchells are liable only for their own expenses, damages, and attorney fees, then it is unclear how Builder of Dreams can claim that they are due an award for attorney fees under this provision.

Builder of Dreams' interpretation of the provision is, in fact, the most strained reading of all. In order to interpret the provision in the way Builder of Dreams is suggesting, the provision would be unconscionable, as Owner would be responsible for Builder of Dreams' fees even if Owner prevailed on a "dispute" not defined within Paragraph 28. This is an illogical interpretation, as it requires the Court to ignore the limitations concerning a "dispute" within Paragraph 28, and further requires the Court to interpret the final sentence to mean that Owner is responsible for each and every parties' "expenses, damages and attorney fees," even if Owner or some third party prevails on a claim against Contractor.

There is no way to read the final sentence of Paragraph 28 so that Builder of Dreams would ever be liable for any damages to anyone, including the Owners, for any action or omission on its part. Under this interpretation, Builder of Dreams would not even be liable for damages arising from its own breach of a non-delegable duty, such as violation of the WISHA regulations. This interpretation would also result in Builder

of Dreams drafting away all of its own responsibility and force the Owners to assume everything. Since the contract must be construed against Builder of Dreams, this cannot be the outcome.

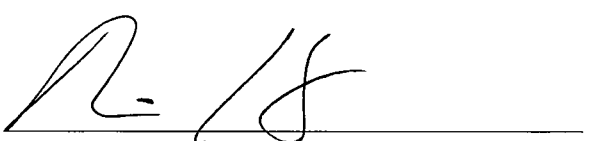
Builder of Dreams did not identify a contractual right to attorney fees for prevailing on claims it brought against defendants Mitchell. The provision relied upon by Builder of Dreams is ambiguous and must be interpreted against it as the drafter. Because of this, the trial court abused its discretion in making an award of attorneys fees based upon Paragraph 28, and this Court should reverse that award.

V. CONCLUSION

The trial court erred in finding that the parties entered into a cost-plus contract as opposed to a fixed price contract and in awarding damages, interest, and attorneys fees and costs to Builder of Dreams. Appellants Mitchell respectfully request that this Court reverse the trial court's entry of judgment in favor of Builder of Dreams.

RESPECTFULLY SUBMITTED this 17th day of May, 2012.

DAVIES PEARSON, P.C.
Attorneys for Defendants/Appellants
Mitchell



BRIAN M. KING, WSBA #29197
REBECCA M. LARSON, WSBA # 20156

NO. 42771-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 09-2-06759-2

TYLER & DAWN MITCHELL, husband and wife,

Defendants/Appellants,

v.

BUILDER OF DREAMS, LLC,

Defendant/Respondent.

AFFIDAVIT OF SERVICE

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STATE OF WASHINGTON)
ss.
COUNTY OF PIERCE)

Kathy Kardash, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one (21) years, not a party to the above-entitled action and competent to be a witness therein.

That on the 17th day of May, 2012, affiant sent for delivery with the ABC Legal Messenger, upon the following:

Mark B. Anderson
Anderson Law Firm, PLLC
1119 Pacific Avenue, Suite 1305
Tacoma, WA 98402

a true and correct copies of Appellants' Opening Brief, along with a copy of this affidavit.

Kathy Kardash
KATHY KARDASH

Subscribed and sworn to before me this 17th day of May, 2012.

KERRI A. POWERS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-31-14

Name: Kerri A Powers
Notary Public in and for the State of Washington, residing at Puyallup
My Commission expires: 10-31-14

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